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In the Supreme Court of the United States

OCTOBER TERM, 1972

HONORABLE JOHN F. DOOLING, JR., UNITED STATES DISTRICT JUDGE, PETITIONER

v.

JOHN HILBERT, III

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Honorable John F. Dooling, Jr., United States District Judge for the Eastern District of New York, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, granting a petition for a writ of mandamus.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-20a) is not yet reported. The order of the district court (App. C, *infra*, p. 23a) is not reported.

JURISDICTION

The judgment of the court of appeals granting the petition for a writ of mandamus (App. B, *infra*, pp. 21a-22a) was entered on March 12, 1973 The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the absence of express authorization by Congress it is a valid judicial policy to dismiss lawful indictments, with prejudice, for delay in prosecution, where the delay does not violate the defendant's Sixth Amendment right to a speedy trial and where such a dismissal is contrary to Rule 48(b) of the Federal Rules of Criminal Procedure.

2. Whether a defendant in a criminal case may use the writ of mandamus to obtain pre-trial appellate review of the denial of a motion to dismiss an indictment.

STATUTES AND RULES INVOLVED

18 U.S.C. 3771 provides:

> The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of

> Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. 332(d) provides:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Rule 4 of the Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases (28 U.S.C.A., Rules (Supp.), pp. 65-67)[1] provides:

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[1] The Second Circuit Rules are set forth in their entirety in App. E, *infra*, pp. 29a-34a.

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

STATEMENT

On May 30, 1972, a grand jury in the United States District Court for the Eastern District of New York returned an indictment charging respondent John A. Hilbert, III, and a co-defendant with possession of twelve kilograms of marijuana with the intent to distribute that controlled substance in violation of 21 U.S.C. 841(a)(1). Prior to trial, Hilbert moved to dismiss the indictment on the ground that a prior indictment charging the same offense had been dismissed because of the government's failure to comply with the Second Circuit Judicial Council's Rules Regarding Prompt Disposition of Criminal Cases (App. E, *infra*, pp. 29a-34a) and that such a dismissal is to be with prejudice. The district court denied the motion (App. C, *infra*, p. 23a) and respondent petitioned the court of appeals for an order in the

nature of a writ of mandamus directing the district court to dismiss the indictment. The court of appeals, *en banc*, over the dissent of Chief Judge Friendly, granted the writ (App. A, *infra*, pp. 1a-20a).

1. The material facts are not in dispute. On August 5, 1971, respondent and one Bruce A. Turnbull, were arrested for possession of approximately 12 kilograms of marijuana which had been illegally imported into the United States. They were arraigned on the same day before a United States Magistrate and were freed on their own recognizance.

On February 3, 1972, less than six months from the date of the arrest, a grand jury in the United States District Court returned an indictment which charged respondent and his co-defendant with possession of the 12 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). On the day following the return of the indictment, a notice was sent by mail to respondent and his co-defendant advising them to appear for arraignment on February 17, 1972, and they appeared on that date and pleaded not guilty.

On March 10, 1972, the two defendants moved to dismiss the indictment, pursuant to Rule 4 of Second Circuit Council Rules Regarding Prompt Disposition of Criminal Cases, which provides:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed

> indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

They claimed that since they were not arraigned on the indictment until 12 days after the expiration of the six-month period following their arrest, the government was not ready for trial within the period prescribed by Rule 4. (The government's notice of readiness was not filed until March 16, 1972, approximately six weeks after the indictment, and seven months after the initial arrest.) The district judge, petitioner John F. Dooling, Jr., granted the motion to dismiss (App. D, *infra*, pp. 24a-28a).

2. On May 30, 1972, a grand jury of the same court returned a second indictment against respondent and his co-defendant charging them with the same offense as the initial indictment. The two defendants again moved to dismiss the indictment contending that under the Second Circuit Judicial Council Rules the dismissal of the earlier indictment barred any further prosecution for the same offense. Petitioner, in his capacity as United States District Judge, denied the motion to dismiss the indictment (App. C, *infra*, p. 23a). The Second Circuit Council Rules do not provide expressly for dismissal with prejudice and petitioner concluded that such a remedy

was inappropriate. Petitioner stated that the dismissal of the initial indictment had the effect of expunging "the arrest, and every attendant consequence." The defendants were freed, without the restraint of bail, and "the effect of the arrest has been wholly erased" (Tr. 20, Exhibit F to Petition for Mandamus).

3. On October 4, 1972, some four months after petitioner entered the order (App. C, *infra*, p. 23a) denying the motion to dismiss the indictment and prior to trial, respondent petitioned the court of appeals for an order in the nature of a writ of mandamus directing the district court to dismiss the indictment. The court of appeals, *en banc*, granted the petition. The majority held that in promulgating the Prompt Disposition Rules it intended to mandate a dismissal with prejudice, in the event that the government was not ready for trial within six months, even where the delay in prosecution did not violate the Sixth Amendment and the defendant did not suffer any prejudice. Such a dismissal was essential, the court stated, because if "the government were permitted to reindict after a Rule 4 dismissal, our Prompt Disposition Rules would be rendered * * * a dead letter, since the government would have less incentive to push forward to trial" (App. A, *infra*, p. 9a). The majority recognized that Rule 48(b) of the Federal Rules of Criminal Procedure, which has the force and effect of statute (18 U.S.C. 3771), expressly vests the district court with the *discretion* to dismiss

an indictment for delay in prosecution, and does not compel a dismissal, and the Rule does not require that any dismissal be *with prejudice*. The court below nevertheless held that the Circuit Judicial Council had the authority pursuant to 28 U.S.C. 332, to adopt a rule which would compel a dismissal under Rule 48(b) where in the judgment of the Circuit Council "it would be an abuse of discretion not to dismiss with prejudice" (App. A, *infra*, p. 15a).

The court of appeals also held that mandamus was the appropriate remedy to obtain pre-trial appellate review of the order denying the motion to dismiss the indictment even though respondent had not been tried and could have raised the issue on appeal from a valid judgment of conviction.

Chief Judge Friendly dissented, taking the position that the Circuit Council did not have authority under 28 U.S.C. 322 or any inherent supervisory power "to direct by rule how a district judge shall exercise his discretion in determining whether dismissal of an indictment shall be with or without prejudice" (App. A, *infra*, p. 19a). Chief Judge Friendly also dissented from the majority's determination that mandamus was an appropriate pre-trial remedy. While he acknowledged that a "refusal to dismiss with prejudice in a particular case may be an abuse of discretion, the remedy for this is not mandamus, *Will* v. *United States*, 389 U.S. 90 (1967), but appeal from a conviction on a new indictment if conviction there would be" (App. A, *infra*, p. 20a).

REASONS FOR GRANTING THE WRIT

This case raises issues of policy and statutory construction that are important in the administration of federal criminal justice. The holding of the court of appeals, that the dismissal of an indictment with prejudice can be made a necessary and mandatory remedy for inadvertant delays in indictment and trial which do not violate the Sixth Amendment or prejudice the defendant, is contrary to holdings of other courts of appeals that have declined to infer prejudice to a defendant simply as a result of the passage of an arbitrary period of time, and cannot be reconciled with the language or history of Rule 48(b). While the Second Circuit Council's Rules Regarding Prompt Disposition of Criminal Cases have now been superseded by a similar set of rules promulgated by the district courts and approved by the Second Circuit Judicial Council (App. G, *infra*, pp. 43a-51a), pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure, these new rules likewise provide for dismissal with prejudice in cases where the delay involved does not violate the Sixth Amendment and where, aside from the passage of a prescribed period of time, a defendant has suffered no prejudice. Such an approach has been rejected by every other district court, outside the Second Circuit and in the Model Plan prepared by Judicial Conference Committee on the Administration of the Criminal Law (App. F, *infra*, pp. 38a-39a). The issue whether a dismissal of an indictment with prejudice is a mandatory or appropriate remedy for pre-indictment or pre-trial

delays which do no violate the Sixth Amendment or prejudice the defendant in any way, is an issue of substantive continuing importance and should be resolved by this Court.[2]

In addition, the decision of the court of appeals permitting a defendant to obtain pre-trial appellate review, by way of mandamus, of an order denying a motion to dismiss an indictment marks an unprecedented departure from the rule of finality which "is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323. The holding of the majority would appear to permit appellate review where the defendant claims that on the undisputed facts a dismissal is mandated as a matter of law. The issue whether the extraordinary writ of mandamus is available in these circumstances likewise merits plenary consideration.

1. The determination of the court of appeals, that the " 'public interest' " (App. A, *infra*, p. 9a) would best be served by freeing an individual accused of criminal activity on grounds unrelated to his guilt or innocence or his ability to obtain a fair trial, involves the kind of determination of policy which the Constitution vests in Congress. An appellate court's supervisory responsibility for judicial administration can not properly be exercised as an independent source of judicial power to create defenses

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[2] *United States*, v. *Strunk*, No. 72-5521, argued April 24, 1973, presents the issue whether the dismissal of an indictment is mandatory where there is a violation of the Speedy Trial Clause.

to criminal activity based on a judicial determination of appropriate public policy. See *Ex parte United States*, 242 U.S. 27, 41-42; *United States* v. *Russell*, No. 71-1585, decided April 24, 1973, slip op. p. 10; *United States* v. *Weinstein*, 452 F.2d 704, 715-716 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917.

The basis of the dismissal of the indictment with prejudice here was an inadvertent delay in prosecution which did not violate the Speedy Trial Clause or any statute. On the contrary, Rule 48(b) of the Federal Rules of Criminal Procedure, which was "promulgated by this Court, and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms" the remedies which federal courts may prescribe for unnecessary delays in prosecution.[3] Under that rule, dismissal of the indictment with prejudice would not have been authorized. As the respondent here conceded in the court of appeals: "Under Rule 48(b), delay of unspecified length is permitted unless the defendant can prove that it was 'purposeful and oppressive' or that it was prejudicial to his ability to rebut the government's case * * *" (Petition for Mandamus, p. 17).

To overcome the inherent limitations on its supervisory powers and the contrary thrust of Rule 48, the court of appeals relied mistakenly upon the judi-

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[3] See *Davis* v. *United States*, No. 71-6481, decided April 17, 1973, slip op. p. 8; *United States* v. *Weinstein*, 452 F. 2d 704, 715-716 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917.

cial council statute, 28 U.S.C. 332(d), and erroneously construed Rule 48(b) in a way inconsistent with the intent of the draftsmen, its express language and the cases construing it.

a. In providing for circuit judicial councils to make administrative orders, 28 U.S.C. 332(d) did not confer any power on circuit councils to formulate substantive rules to control the rights of parties to litigation, including the right of the United States to maintain otherwise lawful criminal prosecutions. Instead, the purpose of the statute was to create an administrative mechanism by which district judges could be made the subject of "orders" for the efficient processing of their caseloads. Subdivision (d) of Section 332, which was adopted in 1939 and subjected only to insubstantial changes in phraselogy since then, provides:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

The Senate Judiciary Committee Report (S. Rep. No. 426, 76th Cong., 1st Sess.) which accompanied Section 332(d) clearly shows that Congress did not intend to invest the Circuit Councils with broad rule-making authority. To the extent here relevant, the report (quoting from the testimony of Chief Justice Groner before the Judiciary Committee) states (p. 3):

The bill provides that it shall then be the duty of the judicial council in each circuit to consider the report of the administrative officer, and promptly to take such action as may be necessary to correct whatever is made the subject of criticism therein. That means that if the administrative officer finds that in any particular district the work is behind, as I have heard it said is true of some particular districts, that fact will be embraced in his report and brought to the attention of the judicial council, *and that council will see to it, either that the particular judge who is behind in his work catches up with his work or that assistance is given to him whereby the work may be made current.*

So far as I know personally, the criticism of the courts is due to delay. I have not heard, except perhaps in one or two instances, any substantial criticism of the work of the courts, except that the length of time which ensues between the commencement of a suit and its conclusion is too long, particularly the delay which exists in one or two or three or four districts in the country.

Those matters this bill undertakes to provide for by outlining certain duties of the judicial council. Under the present judicial set-up we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, *for which he may be responsible.*

The bill also provides what is not now true, that it shall be the duty of the district judges,

> when admonished or when matters are otherwise brought to his attention by the judicial council, to take whatever steps are thought to be necessary or declared to be necessary to correct those things which ought not to exist in a well-run judicial system [emphasis added].[4]

While the authority conferred on the Circuit Councils was thus new and significant, it was directed toward broadening the Circuit Councils' power to deal with district court judges who are not "bearing the full * * * burden" of work, or who are conducting themselves in a manner "which is the subject of criticism." Thus, in discussing the powers of judicial councils in *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85, this Court characterized these councils as entrusted principally with "some management power" over district court case loads. In fact, in *Chandler* this Court expressed doubt about whether a judicial council can issue general regulations of even a purely procedural nature, dealing with such subjects as the assignment of judicial business among different district judges: "* * * the legislative history sheds no light on whether Congress intended this statute to be implemented by regulations." 398 U.S. at 85, n. 6. Nowhere in the language of Section 332 or in its legislative history is there any support for the notion that circuit councils were being given the power to prescribe rules

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[4] The portions italicized above, which plainly indicates that the authority sought and authorized was directed to dealing with individual judges, was omitted in the excerpt of the Senate Judiciary Committee Report quoted in the majority opinion of the court of appeals (App. A, *infra*, p. 12a).

that could require the dismissal of otherwise valid criminal indictments.[8]

Unlike 18 U.S.C. 3771, for example, which vests in this Court the power to "prescribe" subject to congressional approval, "rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty * * *," Section 332(d) merely authorizes the making of "orders" for "the effective and expeditious administration of [justice]" which the "district judges shall promptly carry into effect." Compare also Chapter 131 of Title 28—"Rules of Courts" (28 U.S.C. 2071-2075). The difference in language confirms that Congress could not have intended to invest the circuit councils with broad rule-making powers comparable to those it has conferred on this Court pursuant to 18 U.S.C. 3771 and 28 U.S.C. 2072 (the Enabling Act for the Federal Rules of Civil Procedure).

Indeed, the power exercised by the Circuit Council would appear to be broader than that which could have been exercised by this Court, since the practical effect of the Second Circuit rules is to amend the

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[8] The "legislative history" (App. A, *infra*, p. 14a) on which the court of appeals relied for a contrary position is of limited relevance in determining the intent of Congress, and consists largely of general statements, made years after the enactment of Section 332 by various distinguished jurists and one of the sponsors of the bill, to the general effect that "broad" powers were vested in the Circuit Councils (App. A, *infra*, pp. 13a-14a). There is no suggestion in any of those statements indicating that these powers include broad rule-making authority.

provisions of Rule 48(b) of the Federal Rules of Criminal Procedure. Under 18 U.S.C. 3771, this Court could not have accomplished such a modification without a report to Congress and at least tacit congressional approval. Yet, under the holding below, the circuit council apparently achieved the same modification without any such prior submission to Congress. Such result was neither intended by Congress nor accomplished by the provisions of 28 U.S.C. 332(d).

b. The court of appeals apparently recognized the anomaly implicit in its holding, and attempted to reconcile the conflict between Federal Criminal Rule 48(b) and its Prompt Trial Rule 4 by suggesting that the circuit council's rule was merely construing Rule 48(b): "Our Speedy Trial Rules merely flesh out the skeleton of Rule 48" (App. A, *infra*, p. 15a).

The manner in which Rule 48(b) was interpreted by the court of appeals, however, is wholly inconsistent with the intent of the draftsmen and every court of appeals decision construing Rule 48(b).

The Advisory Committee Notes indicated that Rule 48(b) was intended as "a restatement of the inherent power of the court to dismiss a case for want of prosecution." 18 U.S.C.A. (Fed.R. Crim. P. Rules 32-60) pp. 377, 378. While there is reason to doubt that any such inherent power existed at all,[6] to the

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[6] Compare *Frankel* v. *Woodrough*, 7 F. 2d 796, 798 (C.A. 8); *Daniels* v. *United States*, 17 F. 2d 339 (C.A. 9); *Fowler* v. *Hunter*, 164 F. 2d 668 (C.A. 10); *Miller* v. *Overholser*, 206 F. 2d 415 (C.A.D.C.).

extent that an "inherent power" was recognized, it was limited to dismissals without prejudice unless it could be shown that the Sixth Amendment was violated.

The district court decision in *Ex parte Altman*, 34 F. Supp. 106 (S.D. Cal.), the only case cited by the Advisory Committee to show the existence of an "inherent power" of a court to dismiss for want of prosecution, is illustrative. There the issue was whether a district court had the power to vacate an order which it had previously entered dismissing an indictment for failure to prosecute. The district court held that such action was proper "unless the act has acquired a finality which is beyond the court's reach" (34 F. Supp. at 108). Concluding that a dismissal for failure to prosecute was not such a final order, the district court summarized the consequences of a dismissal for want of prosecution (34 F. Supp. at 108-109):

> * * * [T]he order of dismissal [for want of prosecution] was neither a judgment nor was it final. A dismissal or nolle prosequi does not work an acquittal. Dealy v. United States, 1894, 152 U.S. 539, 543 * * *; Meyers v. United States, 3 Cir., 1929, 36 F.2d 859, 861; Cochran v. United States, 8 Cir., 1930, 41 F.2d 193, 207; Miller v. United States, 9 Cir., 1931, 47 F.2d 120. Or bar a second prosecution for the same offense. Wolff v. United States, 1 Cir., 1924, 299 F. 90. It does not constitute jeopardy. United States v. Percansky, D.C. Minn., 1923, 298 F. 991. Nor is it an appealable order. Lewis v. United States, 1910, 216 U.S. 611 * * *.

The holding in *Ex parte Altman* reflects substantially the settled principal that "[a]t the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict" within a reasonable time after arrest. *United States* v. *Cadarr*, 197 U.S. 475, 478; *United States* v. *Marion*, 404 U.S. 307, 317.[7]

Since Rule 48(b) was intended to codify the common law power to dismiss for want of prosecution, it is plain that the Advisory Committee could not have contemplated dismissal with prejudice for mere delay in prosecution nor could Congress have intended to delegate to circuit judicial councils or to the district courts the power to shorten the applicable statutes of limitations under circumstances in which

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[7] In *United States* v. *Cadarr*, *supra*, the issue presented was whether a statute, which provided that if any person "charged with a criminal offense shall have been committed or held to bail" the grand jury must act within a specified period of time or the accused would be set free (D.C. Code § 939, 31 Stat. 1342, now D.C. Code § 23-102, 84 Stat. 605). A defendant who had not been indicted within the time specified asserted that any further prosecution for the same offense was barred. In rejecting the claim, the Court held (197 U.S. at 479):

> If it had been the purpose of Congress to work so radical a change in the law as to end the right of further prosecution for the offense, we think it would have used language apt for that purpose, and the failure so to do indicates the intention to deal only with delays in action by the grand jury against persons under arrest or bonds.

the delay in prosecution did not violate the Sixth Amendment or in any way prejudice the defendant.

The courts of appeals, in accordance with the language and purpose of Rule 48(b), have consistently construed Rule 48(b) to authorize a dismissal with prejudice only "pursuant to a finding that the Speedy Trial Clause has been violated."[8] An indispensible prerequisite to any such Rule 48(b) dismissal has been a showing of prejudice or a deliberate or oppressive delay. As Mr. Justice Clark recently stated in writing for the Second Circuit (*United States* v. *Crutch*, 461 F. 2d 1200, 1202:

> Since the delay here involved is not substantial, a dismissal [with prejudice] under Rule 48(b) can only be claimed upon some showing that the defendant has been or will be prejudiced.[9]

The Court of Appeals for the District of Columbia Circuit recently declined to exercise its "supervisory

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[8] *Cohen* v. *United States*, 366 F. 2d 363, 367 (C.A. 9), certiorari denied, 385 U.S. 1035; *Mann* v. *United States*, 304 F. 2d 394, 397 (C.A.D.C.), certiorari denied, 371 U.S. 896; *United States* v. *DiStefano*, 464 F. 2d 845, 849 (C.A. 2); *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4); *United States* v. *Mark II Electronics of Louisiana, Inc.*, 283 F. Supp. 280, 284 (E.D. La.); cf. *United States* v. *Apex Distributing Co.*, 270 F. 2d 747, 750-751 (C.A. 9).

[9] Accord: *United States* v. *De Costa*, 435 F. 2d 630 (C.A. 1); *United States* v. *Crutch*, 461 F. 2d 1200 (C.A. 2); *Hunt* v. *United States*, 456 F. 2d 582 (C.A. 3); *United States* v. *Banks*, 370 F. 2d 141 (C.A. 4); *Reece* v. *United States*, 337 F. 2d 852 (C.A. 5); *United States* v. *Beard*, 381 F. 2d 325 (C.A. 6); *United States* v. *Strauss*, 452 F. 2d 375 (C.A. 7), certiorari denied, 405 U.S. 989; *United States* v. *Gross*, 416 F. 2d 1205 (C.A. 8), certiorari denied, 397 U.S. 1013; *United States* v. *Penland*, 429 F. 2d 9 (C.A. 9).

powers in favor of a *per se* rule" which would infer prejudice simply upon the passage of a prescribed period of time. *United States* v. *Canty*, 469 F. 2d 114, 125. A similar *per se* rule was rejected by this Court in *Barker* v. *Wingo*, 407 U.S. 514, in construing the Sixth Amendment.[10]

Thus, the Second Circuit Council's construction of Rule 48(b), prescribing the "circumstances where * * * it would be an abuse of discretion not to dismiss with prejudice," *i.e.*, simply upon the passage of a prescribed period of time without any showing of prejudice to the defendant (App. A, *infra*, p. 15a), marks an unprecedented departure from the purpose of Rule 48(b) and the application it has received in every circuit.[11] By adopting such an extraordinary substantive remedy, which is inconsistent with the policy of every other circuit, the Second Circuit Rules also effectively undermine one of the purposes of the Federal Rules of Criminal Procedure—the promulgation of "a uniform set of procedures to govern criminal cases within the federal courts consistent with the requirements of justice and sound administration." *United States* v. *Weinstein*, *supra*, 452 F. 2d at 715.

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[10] The Court did not pass upon the validity of such a "rigid" approach (407 U.S. at 522) in the exercise of "supervisory powers" (407 U.S. at 530, n. 29).

[11] The respondent here, as we have previously noted, conceded in the court of appeals that "[u]nder Rule 48(b), delay of unspecified length is permitted unless the defendant can prove that it was 'purposeful and oppressive' or that it was prejudicial to his ability to rebut the government's case" (Petition for Mandamus, p. 17).

Moreover, since Rule 4 of the Second Circuit Rules is intended "only to insure prosecutorial readiness for trial" (*United States* v. *Infanti*, 474 F. 2d 522, 528 (C.A. 2)), and since the principal cause of delay is the congested district court dockets in the Southern and Eastern District of New York (*United States* v. *Infanti*, *supra*, 474 F. 2d at 528; *United States* v. *Nazzaro*, 472 F. 2d 302, 304, n. 2 (C.A. 2)), the practical effect of the automatic dismissal with prejudice rule is to confer arbitrarily a benefit of immunity on a particular class of defendants as a result of inadvertent and nonprejudicial prosecutorial delays when even a statement of readiness would probably not in fact accelerate their trials. See, *e.g.*, *United States* v. *Infanti*, *supra*, 474 F. 2d at 528-529.

2. The recent adoption of Rule 50(b) of the Federal Rules of Criminal Procedure has not diminished in any way the necessity for an authoritative determination by this Court of the appropriate remedy for an inadvertant delay in prosecution which does not violate the Sixth Amendment or come within the ambit of Rule 48(b). Rule 50(b), effective October 1, 1972, provides in pertinent part:

> To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which

> procedures prior to trial, the trial itself, and sentencing must take place, means of reporting the status of cases, and such other matters as are necessary or proper to minimize delay and facilitate the prompt disposition of such cases. * * *

Rule 50(b) does not purport to modify Rule 48(b) nor does it by its terms authorize the imposition of the extraordinary sanction applied here for failure to comply with plans formulated by the district courts. On the contrary Rule 50(b) is simply a delegation of rulemaking functions to the district courts. Since the plans are not subject to prior congressional approval,[12] the rulemaking power must be exercised in a manner "not inconsistent with the statutes or constitution of the United States." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10; cf. 28 U.S.C. 2071. The district courts, therefore, have no authority to amend the statutes of limitations or to promulgate a defense to criminal activity proscribed by Congress (compare 18 U.S.C. 3771).

The Model Plan prepared by the Judicial Conference (App. F, *infra*, pp. 35a-42a) reflects this essential limitation on the power of the district courts by expressly precluding dismissals for non-compliance, except in accordance with the power of the court under Rule 48(b) to dismiss a case for unnecessary delay. Rule 4 of the Model Plan provides in pertinent part:

> Upon the expiration of a time limit, as prescribed by or extended under this rule, a defend-

[12] The plans are subject to prior review by the circuit judicial council and to modification by the Judicial Conference.

> ant who is in custody shall be released from custody unless the Court finds that the defendant is responsible for the failure to comply with the time limits. Subject to the provisions of 18 U.S.C. § 3146, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is good cause shown for the failure to comply. *Subject to the power of the Court to dismiss a case for unnecessary delay, the failure to conform with the time limits herein prescribed shall not require the dismissal of the prosecution.* [App. F, *infra*, pp. 38a-39a; emphasis added.]

The provisions of Rule 4 of the Model Plan have been adopted in substantially identical form by the overwhelming majority of district courts. The six district court plans approved by the Second Circuit Judicial Council, however, contrary to the plans adopted in *every* other district, continue to provide for mandatory dismissal with prejudice if the government is not ready for trial within six months. It seems clear that this phenomenon is due to the role of the Circuit Judicial Council which has required that this provision be carried forward from the Prompt Trial Rule at issue in the present case.[13]

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[13] We are advised by the United States Attorney for the Eastern District of New York that the Second Circuit Judicial Council refused to approve a plan prepared by the Eastern District Court which would not have mandated dismissal with prejudice.

An examination of 85 other district court plans on file in the Administrative Office for United States Courts indicates that 66 have adopted Rule 4 of the Model Plan without sub-

The only variation permitted by the Judicial Council for the Second Circuit is that the new district court plans provide that if "the court finds that the government's neglect is excusable, * * * the dismissal shall not be effective if the government is ready to proceed to trial within ten days" (App. G, *infra*, p. 46a). While the mandatory dismissal rule is slightly less rigid than the comparable provision under Second Circuit Rules, it nevertheless continues to compel dismissals with prejudice where such a dismissal would not be warranted under the Sixth Amendment or Rule 48(b). Accordingly the issue whether it is a valid judicial policy to require such dismissals remains an important issue as to which the lower federal courts are in conflict. The resolution of that conflict warrants plenary review by this Court.

3. The decision of the court of appeals also raises an important issue regarding the use of a writ of mandamus to obtain pre-trial appellate review of an order denying a motion to dismiss the indictment. The court of appeals held that the writ of mandamus was appropriate because on the undisputed facts "the district judge was without power to deny the motion to dismiss the second indictment" (App. A, *infra*, p.

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stantial change; 14 have adopted plans which provided in substance that the district court may take any appropriate action, including but not limited to dismissals for unnecessary delay under Rule 48(b); and 4 have adopted plans containing no provision at all. Only the District Court for the District of Massachusetts (outside the Second Circuit) provides for mandatory dismissal, although it does not indicate whether the dismissal shall be with prejudice.

18a). The policy against "piece-meal review" was held applicable only "where mandamus [is] sought by the government" from an otherwise appealable order (App. A, *infra*, p. 18a).

The rationale of the court of appeals would appear to permit the use of a writ of mandamus any time a defendant in a criminal case claims that on the undisputed facts "the district judge was without power to deny the motion," even though appellate review on the issue is available if a final judgment of conviction is ultimately entered. The holding is contrary to long established principles restricting the right to such interlocutory review.

The law is settled that "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick* v. *United States*, 309 U.S. 323, 325-326; *Cogen* v. *United States*, 278 U.S. 221; cf. *Will* v. *United States*, 389 U.S. 90, 96.

The requirement of finality as a condition of review "is an historic characteristic of federal appellate procedure" and "has been departed from only when observance of it would practically defeat the right to review at all." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-325. As Mr. Justice Frankfurter wrote for a unanimous Court in *Cobbledick*, 309 U.S. at 325:

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy,

> set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. * * * An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. * * * [14]

The "encouragement of delay" inherent in allowing defendants in criminal cases to obtain pre-trial ap-

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[14] This long-settled and well-founded policy against interlocutory appeals in criminal cases is so firm that Congress has authorized only narrow exceptions to it. Thus, Congress has authorized the government to appeal interlocutory orders suppressing or excluding evidence, but only because such rulings would not otherwise be subject to review, and has permitted such review only upon certification that the appeal is not taken for delay and that the evidence is a substantial proof of a material fact. See 18 U.S.C. 3731; compare 28 U.S.C. 1292. In the present case, by contrast, respondent could have preserved his objection to the district court's ruling for appeal from a judgment of conviction—unless, of course, the issue was mooted by an acquittal. This distinguishes the present case from the situation in *United States* v. *United States District Court*, 407 U.S. 297, where the government sought mandamus from the court of appeals because that was the only method by which it could obtain appellate review of the district court's pre-trial order directing disclosure of electronic surveillance.

pellate review of interlocutory orders is illustrated here. There are no time restrictions on when mandamus may be sought; in this case, the petition for mandamus was filed four months after the entry of the order denying the motion to dismiss the indictment, and the case was decided nine months after the order was entered. Had the majority agreed with Chief Judge Friendly that the district court correctly construed the Second Circuit Rules, the net effect of permitting respondent to proceed by mandamus would have been at least a nine month delay in the trial. Since "[d]elay is not an uncommon defense tactic" (*Barker* v. *Wingo*, 407 U.S. 514, 521) the potential for abuse is apparent.

Contrary to the suggestion of the majority opinion below (App. A, *infra*, p. 18a), this Court has held that a defendant in a criminal case may not invoke the "extraordinary writs * * * to thwart the congressional policy against piecemeal appeals." *Parr* v. *United States*, 351 U.S. 513, 520-521. The Second Circuit's departure from that statutory policy warrants plenary review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

EDWARD R. KORMAN,
Assistant to the Solicitor General.

JUNE 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 423—September Term, 1972.

(Argued November 1, 1972 Decided March 12, 1973)
(*En Banc*)

Docket No. 72-2144

JOHN A. HILBERT, III, PETITIONER

—against—

THE HONORABLE JOHN F. DOOLING, JR., in his capacity as United States District Judge for the Eastern District of New York, RESPONDENT

Before:

FRIENDLY, *Chief Judge*,
KAUFMAN, HAYS, FEINBERG, MANSFIELD, MULLIGAN, OAKES and TIMBERS, *Circuit Judges*.

Petition for a writ of mandamus directing Judge John F. Dooling, Jr. of the United States District Court for the Eastern District of New York to dismiss a second indictment of defendant for the same offense on the ground that reindictment was precluded by Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases.

Petition granted.

PHYLIS SKLOOT BAMBERGER, New York, N.Y. (Robert Kasanof, Esq., The Legal Aid Society, New York, N.Y., of counsel), *for Petitioner.*

RAYMOND J. DEARIE, Assistant United States Attorney (Robert A. Morse, United States Attorney, Eastern District of New York, L. Kevin Sheridan, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Respondent.*

WHITNEY NORTH SEYMOUR, JR., United States Attorney, Southern District of New York (Richard J. Davis, John W. Nields, Jr., Assistant United States Attorneys, New York, N.Y., of counsel), *for United States Attorney for the Southern District of New York as Amicus Curiae.*

MANSFIELD, *Circuit Judge*:

The question raised by this petition for a writ of mandamus is whether dismissal of a criminal charge pursuant to Rule 4 of our Second Circuit Rules Regarding Prompt Disposition of Criminal Cases [1] (here-

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[1] Rule 4 provides:

"A. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such

inafter "Prompt Disposition Rules") is with prejudice and thus precludes re-indictment for the same offense. Because of the exceptional importance of the issue at the time when the petition was filed, we heard the petition *en banc*. See F.R.App.P. Rule 35 (a) (2).[2] We conclude that such a dismissal is with prejudice and that mandamus is the appropriate remedy in this case. Accordingly we order the writ granted and the second indictment dismissed.

On August 5, 1971, the petitioner John A. Hilbert, III, and one Bruce A. Turnbull, were arrested by agents of the United States Customs Service. The government contends that at the time of their arrest, Hilbert and Turnbull were in possession of two cartons containing approximately 12 kilograms of marijuana which had allegedly been imported into the

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time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed."

[2] The importance of the issue has been somewhat diminished as a result of the recent adoption by the various district courts within the Second Circuit of new rules for the prompt disposition of criminal cases pursuant to Rule 50(b), F.R. Cr.P., which became effective on October 1, 1972.

These local rules specify in more detail the circumstances under which a charge is to be dismissed with prejudice. Our decision, therefore, governs only those dismissals during the period from July 5, 1971, when the Prompt Disposition Rules went into effect, to April 1, 1973, when the new local district court rules become effective.

United States at Kennedy Airport from Jamaica, West Indies. The two cartons were delivered under government control to a house which was then placed under surveillance. The defendants were arrested a short time after they were observed leaving the house and placing the packages in a car. Neither defendant was incarcerated.

On February 3, 1972, two days before the expiration of the six-month deadline by which the government was required by Rule 4 to be ready for trial, an indictment (the "First Indictment") was filed charging Hilbert with possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2.[3] February 17, 1972 was then fixed for the arraignment, at which the defendants pleaded not guilty. On March 10, 1972, at a pretrial conference before Judge Dooling, the defendants moved for the dismissal of the indictment for failure to comply with Rule 4. Six days later, and over seven months after the arrests, the United States Attorney filed a notice of readiness. In a memorandum and order dated March 22, 1972, Judge Dooling, finding the government not ready for trial within six months from the date of arrests and finding none of Rule

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[3] The First Indictment contained two counts. The first count charged both Hilbert and Turnbull with willful possession of marijuana, a violation of 21 U.S.C. § 841, and 18 U.S.C. § 2. The second count separately charged Turnbull with unlawful importation of marijuana (in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2).

5's exclusions applicable,[4] granted the motion to dismiss.

On May 30, 1972, the grand jury handed down a "superseding" indictment charging the petitioner with the same offense.[5] The defendants moved for

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[4] Rule 5 of the Prompt Disposition Rules provides:

"In computing the time within which the government should be ready for trial [the following periods should be excluded by the district court]:

"(a) The period of delay while proceedings concerning the defendant are pending. . . .

"(b) The period of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel. . . .

"(c) The period of delay resulting from a continuance granted at the request of a prosecuting attorney if:

(i) the continuance is granted because of the unavailability of evidence material to the government's case. . . .

* * * *

"(d) The period of delay resulting from the absence or unavailability of the defendant. . . .

"(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. . . .

"(f) The period of delay resulting from detention of the defendant in another jurisdiction. . . .

"(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

"(h) Other periods of delay occasioned by exceptional circumstances."

[5] The second indictment included three counts. The first two counts were essentially the same as their corresponding number in the first indictment. See note 3 *supra*. The third

the dismissal of this second indictment on the ground, among others, that Rule 4 precluded reindictment. On June 14, 1972, Judge Dooling denied the motion, holding that a new six-month period commenced as of May 30, 1972, the date of the second indictment. It was with respect to this order that Hilbert petitioned this Court for a writ of mandamus pursuant to F.R.App.P. Rule 21 and 18 U.S.C. § 1651.

The Prompt Disposition Rules were adopted pursuant to our supervisory power and 28 U.S.C. § 332. The Rules are designed to alleviate the problems of delay in criminal cases by setting standards stricter than the minimum period prescribed by the applicable statute of limitations or required by the Sixth Amendment. See Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. However, the Rules do not mandate *trial* within a specified period of time, as has been urged by some. See, e.g., American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial 40 (1968). Instead, we have taken a more moderate course, focusing primarily on prevention of prosecutorial delay as a means of implementing the public

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count charged Turnbull with conspiracy under 21 U.S.C. §§ 846 and 963, in violation of 21 U.S.C. § 841(a)(1) and § 952(a). As to petitioner, Hilbert, the indictments were identical. As to defendant Turnbull, though we need not decide the issue, the addition of a conspiracy count based on essentially the same transaction would not appear to be legally significant for the purpose of determining whether the charge should be dismissed under Rule 4 of the Prompt Disposition Rules.

interest in disposition of criminal charges with reasonable dispatch. Rule 4 provides that "the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge . . . whichever is earliest. *If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, . . . the charge shall be dismissed.*" (Emphasis added). The onus on the prosecution is somewhat alleviated by Rule 5, which authorizes the district court to grant extensions of the six-month period where justified by reason of such circumstances as other "proceedings concerning the defendant," the unavailability of material evidence, the unavailability of the defendant, or "[o]ther periods of delay occasioned by exceptional circumstances." However, the government is put on notice that if it does not comply with the Rules, which provide ample leeway for the legitimate needs of preparing a prosecution, it will be foreclosed from proceeding with the prosecution.

In summary, the Rules are designed to require the government to be ready to try cases promptly, subject to certain types of delay generally recognized as arising from legitimate or unavoidable causes. The purpose of Rule 4 is to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have

spawned a backlog of thousands of cases, with the public losing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced.

Although Rule 4, in providing that the "charge shall be dismissed" whenever the government is not ready for trial within the six-month period as extended, does not state explicitly that the dismissal shall be "with prejudice," our intent to mandate such a dismissal is readily apparent from the language, purpose and internal logic of the Prompt Disposition Rules. The use of the imperatives "must" and "shall" and of the word "charge" manifest an intent not only that the dismissal be mandatory but that it have a binding effect. If the Council had intended to give district courts the discretionary power to dismiss with or without prejudice, it would have used permissive language of the type found in Rule 48(b) of the F.R.Cr.P., which provides in pertinent part that "[T]he court *may* dismiss the indictment, information or complaint" (emphasis added)[6] and, like F.R.Cr.P. 48, it would have referred to the document containing the charge, i.e., the indictment, rather than use the more inclusive term "charge." Cf. F.R. Cr.P. Rules 3 and 7(c).

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[6] Rule 48(b) of F.R.Cr.P., dismissal by court provides:

> "If there is unnecesary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint."

Our intent is further manifested by the overall structure of the Prompt Disposition Rules, which specify a gamut of exceptions under which the six-month period could be extended. This detailed and painstaking delineation would have been largely fruitless if the sole sanction for non-compliance were a dismissal which did not preclude reindictment. As the Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases provides:

> "The public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required by some good reason. The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded."

If the government were permitted to reindict after a Rule 4 dismissal, our Prompt Disposition Rules would for the most part be rendered a dead letter, since the government would have less incentive to push forward to trial. Moreover, if reindictment were permitted, the defendant in some instances might actually be placed in a worse position by the Prompt Disposition Rules than if they had not been adopted. Under pre-existing procedures he would continue to face trial in the single pending proceeding, represented by the same trial counsel and having the benefit of expenses incurred for one bail bond and one lawyer.

Reindictment, on the other hand, would start a new proceeding, which could result in a second arrest, necessitating the retention of new legal counsel, the posting of a new bond, and other steps, all at a further cost in terms of money, time and psychological distress. *Cf. Green* v. *United States*, 355 U.S. 184, 187-88 (1957). The instant case is illustrative. Judge Dooling, by permitting reindictment and by finding that Rule 4's six-month period ran from the date of the reindictment, May 30, 1972, in effect allowed the government at least 16 months from the date of the original arrest to be ready for trial and concomitantly placed the defendants in the position of risking duplicative expenses and protracted fear not only of the second prosecution but of the possibility of a third case if the court should dismiss the second indictment for failure of the government to be ready according to the Prompt Disposition Rules. Such a result certainly clashes with the underlying purposes of those Rules.

Our view that dismissal without prejudice would seriously undermine the Rules is shared by the American Bar Association's Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, 40-41 (1968), which states "that the only effective remedy for denial of speedy trial is absolute and complete discharge. . . . Prosecutors who are free to commence another prosecution later have not been deterred from undue delay." [7]

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[7] Nothing we have said should be construed as precluding reindictment when there have been extraordinary circum-

The government suggests that the Circuit Council is powerless to promulgate a rule having the effect of mandating dismissal with prejudice because of the government's non-readiness within six months plus such extensions as are granted by the district court. We disagree. Title 28 U.S.C. § 332 provides in pertinent part:

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

The genesis of § 332 was "an Act to provide for the administration of the United States courts. . . ." Ch. xv, § 306, 53 Stat. 1223, 1224 (Aug. 7, 1939).[8] Under the guidance of Chief Justice Groner of the Court of Appeals for the District of Columbia Circuit, a Committee of the Judicial Conference, working with a committee appointed by the Attorney General, drafted the 1939 bill, S. 188, which was subsequently enacted by Congress with minor modifications. Report on the Powers and Responsibilities of

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stances such as fraud upon the court in obtaining the dismissal, suppression of evidence by a defendant, or the like, which would warrant an extension of time.

[8] For a detailed delineation of the legislative history of 18 U.S.C. § 332, see *Chandler* v. *Judicial Council*, 398 U.S. 74, 89-129 (Harlan, J., concurring). As of the 1948 Amendment, § 332, 62 Stat. 869, 902 (June 25, 1948), the provision was largely in its present form with subsequent amendments limited to language and syntactical modification.

the Judicial Councils, H.R. Doc. No. 201 at 4, 87th Cong., 2d Sess. (1961) (hereinafter "1961 Report"). That bill was designed to provide the newly established Judicial Councils with the tools needed to deal effectively with such problems as judicial delay. Chief Justice Groner emphasized in his testimony presenting the bill to the Senate Commitee on the Judiciary that:

> "[T]he criticism of the *courts is due to delay*. . . .
>
> "Those matters this bill undertakes to provide for by outlining certain duties of the judicial council. Under the present judicial set-up we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism. . . .
>
> "The bill also provides what is not now true, that it shall be the duty of the district judges, when admonished or when matters are otherwise brought to his attention by the judicial council, *to take whatever steps are thought to be necessary to correct those things* which ought not to exist in a well run judicial system." S. Rep. No. 426, 76th Cong., 1st Sess. (1939) (emphasis added).

This statement by one of the principal drafters of the bill, made at a hearing of the Senate Committee which originated at the legislation, is entitled to considerable weight. Cf. *SEC* v. *Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935).

The view that the powers of § 332 were intended to be expansive was echoed by Congresman Emanuel Celler, former Chairman of the Committee of the Judiciary of the House, who was a conference committee member and a manager at the time of the original enactment [9] and by a group of distinguished jurists who, after conducting a study of the powers of the Judicial Councils, concluded that "the responsibility of the councils 'for the effective and expeditious administration of the business of the courts within its circuit' extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system. . . ." [10] 1961 Report, *supra* at 8-9.

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[9] Congressman Celler stated: "[I] know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice." Forward, 1961 Report, *supra* at v.

[10] The Special Committee to study the Powers of the Judicial Councils arose from the September 1960 Judicial Conference. The Committee consisted of Chief Judge Harvey M. Johnsen of the Eighth Circuit, Chairman; Chief Judge J. Edward Lumbard of the Second Circuit; Circuit Judge Richard T. Rives of the Fifth Circuit; Chief Judge Royce H. Savage of the Northern District of Oklahoma and Chief Judge Roszey C. Thomsen of the District of Maryland. The Judicial Conference, after a few modifications, adopted the report at its session of March 13-14, 1961.

The text of § 322 corroborates the legislative history and purpose of the Act. Former Chief Judge Lumbard accurately characterized the statute when he said "As this language is about as broad as it could possibly be, there is no doubt that Congress meant to give to the councils the power to do *whatever might be necessary* more efficiently to manage the courts and administer justice," Lumbard, The Place of the Federal Judicial Councils in the Administration of the Courts, 47 A.B.A.J. 169 (1961) (emphasis added). Similarly Chief Justice, then Judge, Burger, deploring the council's failure to use their powers, noted that § 332 is "all-embracing and confer[s] almost unlimited power. Any problem—whatever it may be—relating to the expeditious and effective administration of justice within the circuit is within the power of the Circuit Judical Council." Proceedngs of the Attorney General's Conference on Court Congestion and Delay in Litigation 58 at 59-60 (1958).

Thus Congress' intent, as manifested by both the language and history of the act, was to give the Councils broad powers to deal with the evil of judicial delay. Our Prompt Disposition Rules, following § 322's mandate, have attempted to attack this problem, with an effective sanction, i.e., dismissal with prejudice for tardy prosecutorial behavior.

Although Rule 4 and Rule 48(b), F.R.Cr.P., deal with the same general subject matter—the court's power to dismiss for delay—we do not find any inconsistency between the two rules. Rule 48(b), which

provides for dismissal by the court "[i]f there is unnecessary delay. . . .," is merely a restatement of "the inherent power of the court to dismiss a case for want of prosecution," Committee Note to Rule 48, 8A Moore's Federal Practice ¶ 48.01. Dismissal under Rule 48 may be without prejudice, see, e.g., *Mann* v. *United States*, 304 F.2d 394 (D.C. Cir.) *cert. denied*, 371 U.S. 896 (1962)—or it may be with prejudice, see, *White* v. *United States*, 377 F.2d 948 (D.C. Cir. 1967)—indeed it must be with prejudice where it is on Sixth Amendment grounds or where prosecution is barred by the statute of limitations. Our Speedy Trial Rules merely flesh out the skeleton of Rule 48, giving content to the sweeping phrase "unnecessary delay" by substituting a more precise, albeit still flexible, six-month rule. Having spelled out in detail the conditions for dismissal with prejudice, the need for discretionary power to dismiss without prejudice ceases to exist where such conditions are met.

Nor does Rule 4 deprive the district court of discretion except under circumstances where, in the Council's opinion, it would be an abuse of discretion not to dismiss with prejudice. The district court retains the power to determine in its discretion whether the period within which the government must be ready should be extended beyond six months for any one or more of the reasons specified in Rule 5; and pursuant to Rule 48(b) the district judge may still decide that unless the government in exceptional cases is ready to proceed to trial in less than six months,

the indictment will be dismissed without prejudice to reindictment. Thus nothing in Rule 48(b) implies that it is the exclusive source of the court's power to dismiss an indictment because of delay or that it precludes mandatory dismissal with prejudice under specified circumstances. Indeed, dismissal with prejudice is required by the Sixth Amendment where the delay is of constitutional proportions. Rule 48(b), therefore, merely confirms the court's general power in the area.

The cases suggesting a contrary conclusion are distinguishable and do not rule out discretionary dismissals with prejudice under circumstances falling short of constitutional or statute of limitation infirmities. In *Mann* v. *United States*, 304 F.2d 394 (D.C. Cir.) *cert. denied*, 371 U.S. 896 (1962), the government itself raised the possibility of a dismissal (which suggests that the dismissal was pursuant to Rule 48 (a) [11] not Rule 48(b)), and as most of the delay was of the defendant's "own making," the trial court "clearly expressed its intent to award dismissal without prejudice to further prosecution should the government later uncover missing evidence." 304 F.2d at 397. See *United States* v. *Chase*, 372 F.2d 453, 463-64 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967),

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[11] Rule 48(a) of the F.R.Cr.P. which deals with dismissals by the attorney for the government provides:

> "The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

which also arose under Rule 48(a). Although some of the language in *United States* v. *Apex Distributing Co.*, 270 F.2d 747, 750-51 (9th Cir. 1959) (*en banc*), where dismissal was based on the government's failure to comply with pretrial discovery orders, appears to reject dismissal with prejudice except in instances when reindictment is barred by the statute of limitations (or, presumably, by the Sixth Amendment) the context is entirely distinguishable since the court there had no occasion to consider the effect of detailed rules of the type here under consideration, which give the government fair and reasonable notice of the consequences of its non-readiness. Although Chief Judge Friendly in *United States* v. *DiStefano*, 464 F.2d 845 (2d Cir. 1972), which held that the dismissal of the indictment there pursuant to Rule 48(b) was not appealable by the government under a specific jurisdictional statute, stated that the dismissal did not "bar" another prosecution, it does not appear that the district court had purported to dismiss with prejudice. Furthermore the court found "nothing in the colloquy to suggest" that the dismissal was pursuant to Rule 4 of our detailed Prompt Disposition Rules, which is the issue here under consideration.

There remains the question of whether mandamus is the appropriate form of relief.[12] We conclude that

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[12] Title 28, § 1651(a) provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary in aid of their respective jurisdictions and agreeable to the usages and principles of law."

it is. "The preemptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)." *Will* v. *United States*, 389 U.S. 90, 95 (1967); see *DeBeers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945); *United States* v. *Dooling*, 406 F.2d 192 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969); *United States* v. *Weinstein*, 452 F.2d 704 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); cf. Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595, 622 (1973). As we have found that Rule 4 of our Prompt Disposition Rules mandates dismissal with prejudice, the district judge was without power to deny the motion to dismiss the second indictment. Unlike the situation in *Will* v. *United States*, *supra*, where mandamus sought by the government was denied, the Court noting that the delay occasioned by piece-meal review could affect "the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense," 389 U.S. at 98, here the denial of the writ, by allowing the second indictment to stand, would jeopardize these important rights.

The petition for writ of mandamus is granted and the district court is directed to dismiss with prejudice the second indictment of the petitioner.

FRIENDLY, *Chief Judge* (dissenting):

However desirable the result reached by the majority may be from a policy standpoint, I cannot agree that either 28 U.S.C. § 332 or the inherent supervisory power of a court of appeals authorizes a judicial council to direct by rule how a district judge shall exercise his discretion in determining whether dismissal of an indictment shall be with or without prejudice. The legislative history of § 332, recited in my brother MANSFIELD'S excellent opinion, has an import to me just the opposite of what it has to the majority. I agree that § 332 gives the judicial council a plenitude of powers with respect to the administration of the district courts, not only over the work of individual judges but over the courts themselves. However, Chief Justice Groner's reference to the then lack of authority "to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action to any other matter which is the subject of criticism" cannot fairly be expanded, without unduly defying the principle of *ejusdem generis*, to telling a district judge that he must invariably exercise his judicial discretion with respect to the effect of the dismissal of an indictment in a particular way. The majority's reading also seems to me to put more weight on the very general remarks of Representative Celler, twenty-two years after § 332 was enacted, than they can fairly bear. The action of our Judicial Council in fleshing out F.R.Cr.P. 48(b) by giving specific con-

tent to the phrase "unnecessary delay" seems to me to have gone to the verge of its power under § 332. I can find no basis for taking the further step of holding that Congress meant to empower a judicial council to adopt a rule that would withdraw the district judge's discretion, admittedly afforded by Rule 48(b), to dismiss either with or without prejudice as he deemed appropriate. While refusal to dismiss with prejudice in a particular case may be an abuse of discretion, the remedy for this is not mandamus, *Will* v. *United States*, 389 U.S. 90 (1967), but appeal from a conviction on a new indictment if conviction there would be.

I should have written in greater depth save for the fact that, with the adoption of F.R.Cr.P. 50(b) and of district court rules for the prompt disposition of criminal cases thereunder, the power of the Judicial Council to direct dismissal with prejudice for violation of its Rules for the Prompt Disposition of Criminal Cases will now be academic for the future. Rule 50 (b) clearly empowers a district court, with the approval of the reviewing panel, to provide that dismissal shall be with prejudice, as has now been done. However, it is worth noting that Rule 4 of the district court rules which have been approved in our circuit, see fn.2 to the majority opinion, affords a measure of flexibility not contained in the Second Circuit Rules for the Prompt Disposition of Criminal Cases, which, having well served the important purpose that led to their adoption, have now been repealed on the effective date of the new district court rules.

I would deny the writ.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of March, one thousand nine hundred and seventy-three.

Present: HON. HENRY J. FRIENDLY,
Chief Judge
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

JOHN A. HILBERT III, PETITIONER

v.

HONORABLE JOHN F. DOOLING, JR., United States District Judge for the Eastern District of New York, RESPONDENT

UNITED STATES OF AMERICA, PLAINTIFF

v.

BRUCE ALAN TURNBULL and ANO., DEFENDANTS

A petition for a writ of mandamus and/or prohibition having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

Ordered that the said petition be and it hereby is granted and that the United States District Court for the Eastern District of New York be and it hereby is directed to dismiss with prejudice the second indictment of the petitioner in accordance with the opinion of this court.

APPENDIX C

ORDER DENYING MOTION TO DISMISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

71 CR 633

UNITED STATES OF AMERICA

-against-

BRUCE ALAN TURNBULL and
JOHN A. HILBERT, III, DEFENDANTS

ORDER

Defendants moved to dismiss the indictment under Rule 4 of the Rules for Prompt Disposition on the ground that the indictment was not found nor the Government ready for trial until more than six months after their arrest on the charges made in the indictment, and on the ground that re-indictment after dismissal of an indictment based on the same charge under Rule 4 made a nullity of the Rule and defeated its purposes; it is, for the reasons stated on the record at the hearing on the motion,

ORDERED that the motion is denied.

Brooklyn, New York

June 14, 1972.

/s/ John F. Dooling, Jr.
U. S. D. J.

APPENDIX D

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72 CR 142

UNITED STATES OF AMERICA

-against-

BRUCE A. TURNBULL and
JOHN A. HILBERT, III, DEFENDANTS

CONFERENCE MEMORANDUM AND ORDER

Defendants Turnbull and Hilbert, are charged in Count One with knowingly possessing on August 5, 1971, twelve kilograms of marijuana in violation of 21 U.S.C. § 841 (a)(1) in that it was possessed with intent to distribute. Defendant Turnbull alone is charged in Count Two with knowingly and intentionally importing twelve kilograms of marijuana into the United States from Jamaica, West Indies. The Count cites Section 841 but apparently the charge ought to be under Sections 952(a) and 960(a)(1).

Apparently two packages addressed to a name in care of defendant Turnbull were suspected by the Customs Service when they arrived at Kennedy by air express. They were examined and field tested and found to contain marijuana. The packages were allowed to be delivered under Government control, and the house to which they were delivered was then

put under surveillance. The defendants were seen to come out of the building with the two packages, which were recognized as being the ones that had been imported, and the defendants were observed while they placed the packages in the trunk of a car that was standing out front. The car got underway, and the Customs vehicle followed it, stopped it, and placed the defendants under arrest. They were taken before the Magistrate, where they were separately represented, and, after a complaint was issued, hearing was waived.

The arrest and proceeding before the Magistrate occurred on August 5, 1971. The indictment was filed on February 3, 1972. There had been, substantially, no communication between the defendants and the Government during the interval. At the very inception, apparently on the day of arrest, there was what the defendants characterized as an offer of terms in the form of a suggestion of a particular disposition that would be acceptable to the Government, but it was rejected on the clients' statements of the facts to counsel.

No request was made by either defendant for a delay of indictment, and no request was made on the part of either defendant for a speedy indictment or for an expedited trial. After the indictment was found, a notification to appear for arraignment was sent out, under date of February 4, 1972, fixing the arraignment date at February 17, 1972.

1. Defendant Turnbull moved on February 29, 1972, for a bill of particulars and for discovery. The

motion is granted and denied as below indicated; the bill will be furnished within ten days to both defendants and discovery will be made with the same effect as if both had requested the particulars and discovery.

As to the Particulars: Count 1, Item 1 is granted except for the word "exact." Item 2 is denied and Item 3 is denied. As to Count 2, Item 1 is granted, Item 2 is denied, Item 3 is granted to the extent of the requiring the Government to identify as well as it can the shipper of the marijuana, and Item 4 is granted (among other reasons, in order to clear up the question about whether the person to whose name the packages were addressed is claimed by the Government to be the defendant Turnbull or a fictitious person or some person other than defendant Turnbull).

As to the Discovery Item: Each defendant is to be supplied with a copy of any confession or statement, whether inculpatory or exculpatory, and any written record of any words of the defendants (however paraphrased or summarized) of which the Government is in the position to offer evidence at the trial. Where the words of the defendant are contained in a report with other material, only so much of the material as paraphrases or quotes or summarizes the words of the defendant is to be supplied, together with the name of the person to whom the statement was made and the time and place when it is alleged to have been made.

The Government agreed that it would advise the defendant Hilbert of anything that was taken from

his person incidental to the arrest and which the Government has or has inventoried. The defendant Turnbull makes a similar request, extended to anything discovered in the search of the house to which the packages were addressed.

2. Both defendants have moved orally under Rule 4 of the Second Circuit Rules regarding Prompt Disposition of Criminal Cases, to dismiss the indictment on the ground that while it was found as an indictment within the six month period it was not found in such time that the Government was or could be ready for trial within six months from the date of the arrest (or the date of the filing of the complaint on which hearing was waived). The six months had passed before the defendants made their appearance for pleading pursuant to the Notice to Plead. None of the exclusions of Rule 5 is available to the Government, and its Notice of Readiness was not served until March 16, 1972. Meanwhile on February 24, 1972, the Court's Notice of Pretrial Conference had been sent out fixing the initial conference at March 10, 1972; the conference was held and *the motions made on March 10.*

It is argued that the defendants were not arraigned within the six month period, and that neither side could be said at the time when the indictment was handed down to be in a position to go to trial, or to be put to trial: not the Government, because it controlled the issuance of the notification to plead, and it had not afforded the defendants time to plead or make any motions with respect to the indictment

under the rules until after the six months had passed, and not the defendants since the notification to plead was returnable after the six months period, and their rule times for motions had not even commenced to run until after the six months had passed. See Rules of Criminal Procedure, Rules 7(f), 12(b)(3), 16(f), 22.

The motions must be granted. While there is a substantial question concerning the effect of the defendants entering their pleas of not guilty on February 17, 1972, without raising the point, see Rules of Criminal Procedure, Rule 12(b)(2), (3), Rule 8 of the Prompt Disposition Rules implies that the ground of the motion is not considered to be within Rule 12(b)(2) since Rule 8 itself radically narrows the area within which waiver through non-action can function. The Prompt Disposition Rules reflect concern for the public interest in speedy disposition and, inferentially, are not readily waived. The meaning and purpose of the Prompt Disposition Rules are explicit, they have not been complied with, and the sole and mandatory sanction of Rule 4 is dismissal.

Accordingly, on defendants' motion, it is

ORDERED that the indictment is dismissed as to both defendants.

Brooklyn, New York

March 22, 1972

/s/ John F. Dooling, Jr.
U. S. D. J.

APPENDIX E

SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES

The Circuit Council of the Second Circuit in the exercise of its supervisory power over the administration of justice in the federal courts of the circuit, and pursuant to its powers under 28 U.S. Code § 332 [28 U.S.C.A. § 332], hereby promulgates the following rules for observance in the district courts of the circuit, commencing six months from the date of this announcement:

1. Priorities in scheduling criminal cases.

Insofar as is practicable:

(a) the trial of criminal cases shall be given preference over civil cases, as provided by Rule 50, Federal Rules of Criminal Procedure; and

(b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

2. The United States Attorney of each district shall file every two weeks with the chief judge of the circuit, and the chief judge of his district, a report of all persons held in jail prior to trial, the period of detention, and the reason for such detention or delay in the disposition of charges pending against them.

As to all other criminal cases the United States Attorney shall make a similar report monthly regarding each case in which the trial has not commenced within six months of the date of arrest, service of summons, detention, or the filing of the charge for which the defendant is to be tried, whichever is earliest.

3. In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary. This shall not apply to any defendant who is serving a term of imprisonment for another offense, nor to any defendant who, subsequent to release under this rule, has been charged with another crime or has violated the conditions of his release.

4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under

rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

5. In computing the time within which the government should be ready for trial under rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) The period of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel. The district court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

(c) The period of delay resulting from a continuance granted at the request of a prosecuting attorney if:

(i) the continuance is granted because of the unavailability of evidence material to the gov-

ernment's case, when the prosecuting attorney has exercised due diligence to obtain such evidence will become available within a reasonable period; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the government's case and additional time is justified by the exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure

of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other periods of delay occasioned by exceptional circumstances.

6. If the defendant is to be retried following a mistrial, an order for a new trial, or an appeal or collateral attack, the time shall run from the date when the order occasioning the retrial becomes final.

7. If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state or other institution or that of another jurisdiction, it is his duty promptly:

(a) to undertake to obtain the presence of the prisoner for plea and trial; or

(b) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under these rules.

8. A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

9. The district courts may implement these rules in any manner not inconsistent therewith.

J. EDWARD LUMBARD,
Chief Judge.

LEONARD P. MOORE,
HENRY J. FRIENDLY,
J. JOSEPH SMITH,
IRVING R. KAUFMAN,
PAUL R. HAYS,
ROBERT P. ANDERSON,
WILFRED FEINBERG,
Circuit Judges.

January 5, 1971.

APPENDIX F

MODEL PLAN FOR THE UNITED STATES DISTRICT COURTS FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, the judges of the United States District Court for the District of ———— have adopted the following Plan to minimize undue delay and to further the prompt disposition of criminal cases.

1. *Priorities in Scheduling Criminal Cases.*

(a) Preference shall be given to criminal proceedings as far as practicable as required by Rule 50(a) of the Federal Rules of Criminal Procedure.

(b) The trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

(c) Individual calendars shall be managed so that it will be reasonably anticipated that every criminal case set for trial will be reached during the week of original setting.

2. *Time Requirements.*

Subject to the provisions of section 3 hereof, the judges of this court will observe the following time limits, which are deemed to be maximum time limits:

(a) Arraignments. If a defendant is prosecuted on an information or an indictment he shall be ar-

raigned and enter a plea within 20 days * if in custody, or within 30 days * if not in custody, calculated from the date of the filing of the information or the return of the indictment.

(b) Trial. The trial shall commence within 90 days * after a plea of not guilty, if the defendant is held in custody or within 180 days * if he is not in custody.

(c) Sentencing. A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere.**

(d) Where a defendant is apprehended outside of this district, the time set out above shall begin to run when the defendant is returned to this district.

(e) The implementation of other sections of this Plan will in most cases dispose of a criminal case in substantially less time than the maximums herein set forth.

3. *Extension of Time Limits.*

Any period of time prescribed by this rule may be extended by the Court. Among other reasons, the Court may take into consideration:

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* *COMMENT*: The recommended time is designed to accommodate the omnibus procedure. As an alternative, the districts may reduce the time for arraignment and entry of plea. If pleas are not ordinarily taken until about 20 or 30 days after indictment or information, the 90 and 180 day periods should be reduced, in order to ensure the trial of all defendants within 6 months, if practicable.

** *COMMENT*: This specific period may be varied in accordance with the presentence report practices and procedures in the district.

(a) A reasonable period of delay resulting from other proceedings concerning the defendant, including, but not limited to, proceedings for the determination of competency and the period during which he is incompetent to stand trial, extraordinary pretrial motions, stays, interlocutory appeals, trial of other charges, and the period during which such matters are under consideration.

(b) The period of delay resulting from continuances granted by the Court for persuasive reasons, on application of the defendant or the prosecution. See Note 1. The Court shall grant such continuances

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Note 1.

It is recognized that it is difficult to include all specific reasons for continuances in a stated plan. Such reasons may include but need not be limited to:

(a) The period of delay resulting from a continuance granted by the Court at the request of, or with the consent of, the defendant or his counsel. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the Court of his rights under these rules and the effect of his consent.

(b) The period of delay resulting from a continuance granted at the request of a prosecuting attorney if:

(1) the continuance is granted because of the unavailability of evidence material to the government's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(2) the continuance is granted to allow the prosecuting attorney additional time to prepare the government's case and additional time is justified by the exceptional circumstances of the case.

[Note 1 continued on page 38a]

only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges and the interest of the defendant in a speedy trial.

4. *Effect of Noncompliance with Time Limits.*

Upon the expiration of a time limit, as prescribed by or extended under this rule, a defendant who is in custody shall be released from custody unless the Court finds that the defendant is responsible for the failure to comply with the time limits. Subject to the provisions of 18 U.S.C. § 3146, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is

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Note 1. [Continued]

(c) The period of delay resulting from the absence or unavailability of the defendant.

(d) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(e) The period of delay resulting from detention of the defendant in another jurisdiction, provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(f) The period during which the defendant is without counsel for reasons other than the failure of the Court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(g) Other periods of delay occasioned by exceptional circumstances.

good cause shown for the failure to comply. Subject to the power of the Court to dismiss a case for unnecessary delay, the failure to conform with the time limits herein prescribed shall not require the dismissal of the prosecution.

5. *Definition of "Custody."*

As used in this Plan, "custody" means custody on the federal charge contained in the pertinent complaint, information, or indictment.

6. *Procedures Intended to Facilitate Prompt Disposition of Cases.*

(a) All pre-trial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

(b) The Court or the Magistrate at the time of arraignment or at the time of any proceeding preliminary to arraignment shall promptly appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure. If a defendant appears for arraignment without counsel his arraignment may be postponed not more than one week to permit him to obtain or to consult with counsel. When appropriate, the Court may cause a plea of not guilty to be entered for the defendant. The Court shall take adequate steps to ensure that defendants are represented by counsel.

(c) A trial date shall be set at the time of arraignment or at the earliest practicable time thereafter.

(d) Except for good cause shown, the Court may not extend the time for motions under F.R.Crim.P. 12(b)(3) beyond 10 days after plea. Such motions will be heard and ruled upon promptly, so that the trial need not be delayed.

(e) If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

7. *Retrials.*

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

8. *Review of Defendants in Custody and Delinquent Cases.*

(a) The United States Attorney shall within 5 days after the close of the reporting period furnish the Court with a copy of the biweekly DJ-130 report of persons in custody, on which shall be indicated by court number the judge to whose court such person has been assigned. A copy of such report shall be furnished each judge of the court.

(b) The United States Marshal shall every month furnish each judge of the court with a statement of persons in federal custody and the date of such custody according to his records.

(c) At not more than 6 month intervals the judges of the court shall meet to review the status of all persons in custody and all cases in which the maximum time limits set forth in section 2 have been exceeded. Cases shall be reassigned as appropriate in order to carry out the purpose of this Plan. The United States Attorney shall be informed of any case in which is office appears to be responsible for unnecessary delay.

9. *Responsibility of United States Attorney*

(a) The Court has sole responsibility for setting and calling cases for trial. A conflict in schedules of Assistant United States Attorneys will not be ground for a continuance or delayed setting except under unusual circumstances approved by the Court and called to the Court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with the scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

(b) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:

(1) to undertake to obtain the presence of the prisoner for plea and trial; or

(2) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under the Federal Rules of Criminal Procedure and this Plan.

10. *Effective Date of Plan.*

This Plan shall become effective upon approval of the reviewing panel designated in accordance with F.R.Crim.P. 50(b).

APPENDIX G

PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES

(Approved February 28, 1973;
Effective April 1, 1973)

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, the judges of the United States District Court for the Eastern District of New York have adopted the following plan to minimize undue delay and to further the prompt disposition of criminal cases:

1. *Priorities in Scheduling Criminal Cases.*

   Insofar as is practicable:

   (a) the trial of criminal cases shall be given preference over civil cases, as provided by Rule 50(a) Federal Rules of Criminal Procedure; and

   (b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases. As used in this plan, "custody" means custody on the federal charge contained in the pertinent complaint, information, or indictment.

2. *Review of Defendants in Custody and Delinquent Cases.*

   (a) The United States Attorney and the United States Marshal of this District shall submit to the Chief Judge of the Circuit and the Chief Judge of the District Court reports of defendants in custody and delinquent cases as prescribed by the Circuit Executive, with approval of the Chief Judge of the Circuit. Copies shall be furnished each District Court Judge and the Circuit Executive.

   (b) At not more than six-month intervals the judges of the court, or a committee thereof, shall review the status of all persons in custody and all cases in which the maximum time limits set forth in Rules 3 and 4 have been exceeded. Cases shall be reassigned as appropriate in order to carry out the purposes of this plan. The United States Attorney shall be informed of any case in which his office appears to be responsible for unnecessary delay.

3. *Detained Defendants: Trial Readiness and Effect of Non-Compliance.*

   In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for trial within such time, and if the defendant is charged only with non-

capital offenses, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary. This shall not apply to any defendant who is serving a term of imprisonment for another offense, nor to any defendant who, subsequent to release under this rule, has been charged with another crime or has violated the conditions of his release.

4. *All Cases: Trial Readiness and Effect of Non-Compliance.*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied,

whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

5. *Excluded Periods.*

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) Periods of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The district court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the

court of his rights under these rules and the effect of his consent.

(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(ii) the prosecuting attorney is actively preparing the government's case for trial and additional time is justified by exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other period of delay occasioned by exceptional circumstances.

6. *Retrials.*

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

7. *Demand and Waiver Provisions.*

A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

8. *Procedures Intended to Facilitate Prompt Disposition of Cases.*

(a) Pre-trial conferences pursuant to Rule 17.1, Federal Rules of Criminal Procedure, shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

(b) The court or magistrate at the time of arraignment or at the time of any proceeding preliminary to arraignment shall promptly appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure. If a defendant appears for arraignment without counsel his arraignment may be postponed not more than one week, except for good cause shown, to permit him to obtain or to consult with counsel. When appropriate the court may cause a plea of not guilty to be entered for the defendant. The court shall take adequate steps to ensure that defendants are represented by counsel.

(c) A trial date shall be set at the time of pretrial conference or at the earliest practicable time thereafter.

(d) If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

(e) A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere. This specific period, however, may be varied in accordance with the pre-sentence report practices and procedures in this district.

9. *Responsibility of United States Attorney and Defense Counsel.*

(a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

(b) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:

(i) to undertake to obtain the presence of the prisoner for plea and trial; or

(ii) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under the Federal Rules of Criminal Procedure and this plan.

10. *Effective Date of Plan.*

This plan shall become effective upon approval of the reviewing panel designated in accordance with Rule 50(b) Federal Rules of Criminal Procedure.

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Nos. 72-1653 and 73-288

In the Supreme Court of the United States

OCTOBER TERM, 1973

HONORABLE JOHN F. DOOLING, JR., UNITED STATES DISTRICT JUDGE, PETITIONER

v.

JOHN HILBERT, III

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH SCAFO

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

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The government has asked the Court to review these two cases because they raise the important question of criminal law enforcement whether the Judicial Councils or the districts courts have authority to promulgate rules requiring dismissal with prejudice of indictments because of prosecutorial delays not involving denial of the right to a speedy trial

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guaranteed by the Sixth Amendment. The Court of Appeals for the Second Circuit, contrary to the views of all other circuits, has adopted and approved rules requiring such dismissal. Respondents do not seriously deny the importance of the issue or make any convincing showing that the decisions of the Second Circuit in these two cases are sound. Rather, they raise a series of technical objections which, they contend, make these cases inappropriate vehicles for deciding the issue, and also argue that these decisions "will have a minimum effect, if any, on matters now pending in the District Court" (Scafo Opp. 5; Dooling Opp. 2–3).

The issue that these petitions present is an important and major one that requires resolution by this Court. Respondents' attempts to avoid the issue are unconvincing.

1. Both respondents seek to minimize the impact of the Second Circuit's Speedy Trial Rules, upon which the dismissals here were predicated, on the ground that those rules have now been superseded by local district court rules issued pursuant to Rule 50(b), Fed. R.Crim.P.

But neither respondent denies that the Rule 50(b) plans adopted by the district courts in the Second Circuit are substantially similar to the Speedy Trial Rules involved in the present cases. Both mandate dismissal for delay based on the passage of an arbitrary period of time, without regard to a demand for a speedy trial or prejudice to a defendant's ability to defend himself (Dooling Pet. 24). Indeed, the basic

similarity of the Circuit Council Rules and the Rule 50(b) plans recently caused the court of appeals to observe that, "although this case [involving a dismissal of an indictment] is governed by the prior Prompt Disposition Rules, the decision bears also on the proper interpretation of the District Plans." *United States* v. *Lasker,* Nos. 73–1370, 73–1102—73–1108, decided June 11, 1973 (C.A. 2), slip op. p. 4115, n. 1.[1]

While the petitions may appear also to challenge the power of the Circuit Council to exercise any rule-making authority under 28 U.S.C. 332, the purpose of that discussion was to demonstrate how far the Circuit Council had exceeded its proper function here in legislating a rule which not only grants unprecedented authority to the district courts, but is wholly at odds with Rule 48(b), Fed.R.Crim.P., which this Court adopted with the concurrence of Congress and which has the force and effect of law (18 U.S.C. 3771).

But whatever power the Circuit Councils (as well as the district courts under Rule 50(b)) may have to promulgate procedural rules to speed the consideration and determination of criminal cases, that power

[1] The statement in the majority opinion in *Dooling* (Pet. App. A, p. 3a), cited by Hilbert (Opp. 3), that "[t]he importance of the issue has been somewhat diminished as a result of the recent adoption * * * of new [Rule 50(b)] rules," refers solely to the issue whether in fact the Circuit Council Rules compelled dismissal with prejudice (Dooling Pet. App. A, pp. 2a–3a). We agree that the importance of this issue of construction—which we do not raise here—has been diminished by the adoption of the Rule 50(b) plans, which expressly compel dismissal with prejudice (Dooling Pet. App. G, pp. 45a–46a).

is subject to certain limitations. Since the exercise of these rule-making powers is not subject to prior congressional approval—as is the case when this Court promulgates rules (18 U.S.C. 3771)—the rule-making power must be exercised in a manner "not inconsistent with the statutes [including rules promulgated by this Court] or constitution of the United States." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10; 28 U.S.C. 2071. As the Court of Appeals for the Third Circuit recently held in sustaining the rule-making power of the Circuit Councils:[2]

> Nor do we accept appellant's contention that a judicial council lacks rule-making power. His argument that this would destroy uniformity flies in the face of the fact that every court of appeals, not to mention many district courts, has its own local rules. *The caveat is that such rules must not conflict with rules that have been made effective nationally.* See *In re Mandell*, 2 Cir., 1934, 69 F. 2d 830. [Emphasis supplied.]

The same limitations apply to the rule-making functions delegated to the district courts pursuant to Rule 50(b).

2. Respondent Hilbert argues, however, that the Circuit Council Speedy Trial Rules and the Rule 50(b)

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[2] *In the Matter of Imperial "400" National, Inc.* v. *Nolan*, Nos. 72–1566 and 72–1920 (C.A. 3), decided April 23, 1973, petition for certiorari pending (No. 73–204). The portion of the opinion quoted above appears at p. A–11 of the Circuit Council's petition for certiorari.

plans adopted by all the district courts within the Second Circuit are not inconsistent with Rule 48(b) of the Federal Rules of Criminal Procedure.

He claims first that Rule 48(b) is not breached by a rule compelling dismissal with prejudice because Rule 48(b) "permits dismissal with or without prejudice" (Dooling Opp. 4).[3] We did not, however, suggest that Rule 48(b) precludes dismissals with prejudice. We

[3] Hilbert also takes comfort from the fact that the Circuit Council Rules were cited "favorably" in *Barker* v. *Wingo*, 407 U.S. 514 (Dooling Opp. 4), and in the reference to those rules in the Advisory Committee Notes accompanying Rule 50(b) (Dooling Opp. 7). But it was not until after *Barker* was decided and Rule 50(b) was promulgated that the Second Circuit in *Hilbert* v. *Dooling* "announced that dismissals under Rule 4 are with prejudice" (*United States* v. *Rollins*, 475 F. 2d 1108, 1109 (C.A. 2)). Since the Circuit Council's rule did not state that dismissal with prejudice was mandatory, and since the Chief Judge of the Circuit and the able district court judge in *Hilbert* v. *Dooling* did not so read the Council rules, it is difficult to see what satisfaction Hilbert derives from the citation of the rules in *Barker* and the Advisory Committee Notes. Moreover, the Model Plan, which was prepared and circulated by the Judicial Conference and adopted by most district courts (Dooling Pet. 22–23, n. 13), expressly rejects dismissal as a remedy for noncompliance, and this Court in *Barker* did not purport to decide the validity of the Circuit Council rules, it expressly stated that a dismissal for delay in prosecution was an "unsatisfactorily severe remedy" (407 U.S. 522). Such a dismissal is justified only in the case of a violation of the Speedy Trial Clause, because "such severe remedies are not unique in the application of constitutional standards" (See *Strunk* v. *United States*, No. 72–5521, decided June 11, 1973, slip op. p. 6). Here, of course, it is not alleged that the Speedy Trial Clause was violated.

urge rather that such dismissals are justified only upon a showing that the Speedy Trial Clause has been violated or that a trial would be incompatible with due process because of the delay. Hilbert cites no authority, other than the holding below, which supports a dismissal with prejudice in any other instance. On the contrary, the cases in every circuit—including the Second Circuit—hold otherwise (Dooling Pet. 19–20).

Hilbert next suggests that the Second Circuit's mandatory dismissal rule does not interfere impermissibly with the discretion of the district court under Rule 48(b) because that discretion is limited by the Circuit Council's rules only "when the Government fails to explain why a delay in prosecution of more than six months is not an 'unnecessary delay'" (Dooling Opp. 5). This contention turns Rule 48(b) on its head. The rule, by its terms, is addressed solely to the situation in which there *has been* an unnecessary delay and does not otherwise contemplate dismissal of prosecutions. The discretion to dismiss thus arises only upon a finding of unnecessary delay—and inherent in the existence of "discretion" to dismiss must be a similar "discretion" not to dismiss (unless there has been a "speedy trial" violation of constitutional dimensions).

The extent to which that discretion has been interfered with is demonstrated in *Scafo*. There, despite the district court's finding that "this court does not consider it in the public interest to dismiss charges

of theft at the airport unless they are truly trivial or the delays are clearly inexcusable or there has been real prejudice to the defendant" (Scafo Pet. App. D, pp. 34a–35a), the court of appeals applied its mandatory dismissal rule simply because more than six months had elapsed from the date of arrest.

More significantly, Hilbert's suggestion that, in order to *avoid* dismissal under Rule 48(b), the government must explain why a particular delay is not an unnecessary delay, likewise ignores the holding of every other circuit that in order to *justify* a dismissal—particularly where, as here, no demand for a speedy trial was made or required[4]—there must be a showing that the delay was either deliberate and oppressive or that the defendant was prejudiced (Dooling Pet. 19). Here there was no demand for a speedy trial, no deliberate or oppressive delay, no prejudice to the respondents' right to a fair trial, and no basis for a dismissal under Rule 48(b) or the Sixth Amendment. If, therefore, as the court of appeals held (Dooling Pet. App. A, p. 15a) and Hilbert suggests, all that is involved is a construction of Rule 48(b), then there is a conflict among the courts of appeals which should be resolved.

3. Our petition for certiorari in *Scafo* (Pet. 12-13) also notes that the issue raised here is of immediate

[4] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 8 (Dooling Pet. App. E, p. 33a); Plan for Achieving Prompt Disposition of Criminal Cases, Rule 7 (Dooling Pet. App. G, p. 48a).

practical concern because of the interpretation which *Scafo* and other cases placed on both the Circuit Council Speedy Trial Rules and the Rule 50(b) plans. These cases hold that a notice of readiness is an essential prerequisite to compliance with those rules (Scafo Pet. App. A, pp. 14a–15a). As we represented in *Scafo,* this holding will affect approximately 271 cases in the Eastern District of New York, where until recently it was not the *uniform* practice of the United States Attorney's Office to file a notice of readiness. The likelihood of a dismissal with prejudice, we noted, will encourage numerous motions to dismiss by defendants who took no action to demand a speedy trial. This in turn will involve numerous time-consuming hearings[5] and may ultimately result in the freeing of scores of defendants for reasons wholly unrelated to their guilt or innocence or their ability to obtain a fair trial.

Respondent Scafo claims that this representation is not correct because in *United States* v. *Pierro,* 478 F. 2d 386 (C.A. 2), "the United States Court of Appeals applauded the United States Attorneys Office

[5] In discussing the nature of the hearing held in *Scafo*, the district court observed (Pet. App. D, p. 25a, n.):

"The hearing directed by the Court of Appeals took about two hours. Preparation for the hearing, study of the record and briefs, and drafting and revision of this memorandum and findings required in the aggregate more than another full court day, while decision of civil matters was delayed."

Moreover, even the filing of a timely notice of readiness apparently does not preclude a defendant from obtaining a hearing as to whether the United States Attorney was in fact ready for trial. *United States* v. *Pierro*, 478 F. 2d 386, 388, n. 2 (C.A. 2).

for the Eastern District for adopting a position of issuing a Notice of Readiness" (Scafo Opp. 6). But this policy was not adopted on a mandatory basis until March 1973, when the Court of Appeals first intimated that only "exceptional circumstances" could justify "the Government's failure to file a notice of readiness." *United States* v. *Rollins,* 475 F. 2d 1108, 1111 (C.A. 2). Until then, there had been no indication that a communication of readiness was essential to compliance with either the Circuit Council Rules or the Rule 50(b) plans.[6]

4. In our petition in *Scafo,* we observed that the appeal which led to the dismissal of the indictment in that case was argued and decided after the court of appeals, sitting *en banc* in *Hilbert* v. *Dooling,* had construed the Speedy Trial Rules to compel a mandatory dismissal and had sustained their validity.

[6] It is true, as Scafo notes (Opp. 7), that "a written notice of readiness" is not essential and that an oral communication of readiness will apparently suffice. But while an "oral notice of readiness" at the time of arraignment is the accepted practice in district courts outside the Eastern and Southern Districts of New York, "where the caseload is relatively less burdensome" (*United States* v. *Pierro*, *supra*, 478 F. 2d at 389, n. 3), such a practice was not employed in the Eastern District where defendants are normally arraigned before a "miscellaneous judge," who sets bail and appoints counsel. Only after arraignment is the case automatically assigned to a district judge for trial. Although it is not inconceivable that an oral notice may have been given in some of these 271 cases, the United States Attorney advises us that the principal method of communicating readiness for trial was by written notice and that the "oral notice of readiness" exception will not save a substantial number of the 271 cases in which no written notice was filed.

Accordingly, the same issue was not raised again when the appeal in the instant case was heard by the court of appeals. Respondent Scafo argues, however, that the United States is precluded from raising the issue here because, on the first appeal by Scafo from the judgment of conviction, it had not expressly challenged the validity of the Second Circuit's rules as an alternative ground for affirmance. In addition to this claim, which is unsupported by the meager authority cited by Scafo, he alleges that the failure to raise the issue on the second appeal—which resulted in the decision below—likewise precludes the United States from raising the claims here.

The principle that this Court ordinarily will not consider issues not raised below is a doctrine of judicial administration. It is a discretionary principle, not an immutable rule. The decision whether to apply it in a particular case rests in the sound discretion of this Court. The policy considerations underlying the principle are inapplicable in this case, where the court of appeals *en banc*—albeit in a previous case—had expressly considered and rejected the government's arguments, and where it would have been fruitless to have raised the issues in this case either on the first or second appeal. Under these circumstances, given the benefit of the court of appeals' reasoning on this issue and a clear record which requires no additional findings of fact, there is no basis for arguing that the issues should not be considered by this Court. See *Silber* v. *United States*, 370 U.S. 717; *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412; cf.

Blonder-Tongue v. *University Foundation,* 402 U.S. 313, 320–321, n. 6.

CONCLUSION

These cases present important questions of constitutional law and criminal law administration which this Court should decide. The petitions for writs of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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